IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

ALPHONSE E. D'AMBROSE
Attorney for Petitioners
New York City Transit
Authority, et al.
370 Jay Street
Brooklyn, New York 11201

JOAN OFFNER
EUGENE FREIDUS
Of Counsel

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This reply is submitted to correct certain inaccuracies and misstatements by the Respondents herein in their Brief in Opposition to Certiorari.

I.

Respondents' brief attempts to base jurisdiction on 28 U.S.C. §1331, asserting that the District Court "expressly rested jurisdiction on §1331". (Resp's. brief, p. 16). In fact, neither the District Court nor the Court of Appeals based jurisdiction on §1331.

The District Court decision found plaintiffs entitled to relief "under the Fourteenth Amendment and under 42 U.S.C. §1983" (Petitioners' Petition, p. 68a*). It is no-

* Unless otherwise indicated, all page references will be to Petitioners' Petition for a Writ of Certiorari.

where stated that the court's decision was grounded on 28 U.S.C. §1331.

Likewise, the Court of Appeals for the Second Circuit found that the employment policy

> . . . in this action brought under 42 U.S.C. §1983—violated the equal protection and due process clauses of the Fourteenth Amendment. (Petition, p. 2a)

Respondents apparently infer §1331 jurisdiction from the lower courts' reference to the Fourteenth Amendment. However, 42 U.S.C. §1983 is expressly designed as a vehicle for assertion of constitutional rights. It is apparent from the above quoted language of the Court of Appeals that the finding of a violation of the Fourteenth Amendment was an integral part of the finding of a violation of 42 U.S.C. §1983, and did not have reference to any other jurisdictional base.

Where jurisdiction is found lacking under §1983, jurisdiction under §1331 is not to be lightly inferred. This Court has recently observed that the question of whether an action for damages may be maintained under 28 U.S.C. §1331 against a public agency which is immune from liability for damages under 42 U.S.C. §1983, is "an extremely important question" (*Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 278 (1976).

Numerous cases have supported the proposition that the Congressional intent to immunize public agencies from liability for damages under §1983, would be thwarted by the use of §1331 as the basis for an award of damages.

The Court of Appeals in *Kostka* v. *Hogg*, 560 F. 2d 37, 40 (1st Cir. 1977) stated:

> Even if we assume that an implied right of action might exist [independently] under the Fourteenth Amendment, the policies underlying the qualified privilege for officials sued under §1983 would be fully applicable to a damages action based on the Fourteenth Amendment. The policies in question . . . have equal force regardless of the source of the plaintiff's right of action. See *Kermit Construction Co.* v. *Banco Credito y Ahorro Ponceno*, 547 F. 2d 1 (1st Cir. 1976).
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> In light of . . . the deliberate exclusion of municipalities from §1983, the power of federal courts to make such entities liable through a different means should not be lightly inferred. 560 F. 2d at 44 fn. 6.

See also *McKnight* v. *Southeastern Penn. Transportation Authority*, 438 F. Supp. 813 (D.C. Pa. 1977); *Rafferty* v. *Prince George's County*, 423 F. Supp. 1045 (D. Md. 1976); *Farnsworth* v. *Orem City*, 421 F. Supp. 830 (D. Utah 1976); *Pitrone* v. *Mercadante*, 420 F. Supp. 1384 (E.D. Pa. 1976); *Turano* v. *Board of Educ. of Island Trees Union Free School Dist. No. 26*, 411 F. Supp. 205 (E.D.N.Y. 1976); *Mitchell* v. *Libby*, 409 F. Supp. 1098 (D. Vt. 1976); *Snead* v. *Department of Social Services of the City of N.Y.*, 409 F. Supp. 995, 1001-02 (S.D.N.Y. 1975) (three-judge court) (Mulligan, J. concurring); *Weathers* v. *West Yuma County School Dist. R-J-1*, 387 F. Supp. 552 (D. Colo. 1974), aff'd 530 F. 2d 1335 (10th Cir. 1976); *Smetanka* v. *Borough of Ambridge*, 378 F. Supp. 1366 (W.D. Pa. 1974); *Perzanowski* v. *Salvio*, 369 F. Supp. 223 (D. Conn. 1974).

II.

Respondents seek to distinguish the case at bar from *Monell* v. *Department of Social Services*, 532 F. 2d 259 (2d Cir. 1976), *cert. granted*, 429 U.S. 1071 (1977) on the ground that the Transit Authority, unlike the Board of Education, is an "independent" public body with revenue raising powers. Respondents chose to omit from their brief the clear language of the Court of Appeals in *Monell*:

> We think that the Board of Education is no more a 'person' than the State University, the City Employees' Retirement System or the *City Transit Authority*. (emphasis added) 532 F. 2d at 263.

The Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation." (Public Authorities Law, §1201.1.) The Public Authorities Law expressly declares that the Authority "shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title." (P.A.L. §1202.2) The Authority operates the transit facilities owned by the City of New York. (P.A.L. §1203) It is composed of members appointed by the governor by and with the advice and consent of the senate. (P.A.L. §§1201.1, 1263) The Authority performs the functions previously vested in the Board of Transportation of the City of New York, a former city agency. (P.A.L. §1202.1)

In *Lerner* v. *Casey*, 2 N.Y. 2d 355 (1957), the New York Court of Appeals observed that the City of New York owns the rapid transit facilities which constitute the New York City Transit System, that those facilities are leased by

the City to the Transit Authority, that under the lease, the City is required to pay the costs of the capital improvements on the transit system, and that the City thus has a proprietary interest in those facilities. The Court concluded that "the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare."

The basic governmental role of the Transit Authority closely parallels the governmental role of the local independent school board in *Monell*. The case at bar thus shares with *Monell* the question of jurisdiction over a public agency and its officials under 42 U.S.C. §1983.

Respondents' quotation of *Forman* v. *Community Services, Inc.*, 500 F. 2d 1246 (2d Cir. 1974), rev'd on other grounds sub nom. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975), for the proposition that agencies are deemed "persons" under the Civil Rights Act (Respondents' Brief, pp. 13-14), is thoroughly misleading, in view of the repudiation of the *Forman* language by the same Second Circuit Court of Appeals in *Monell*. The *Monell* Court specifically stated:

> To the extent that the language of the *Forman* opinion may be read to imply that *all* 'agencies' are persons under §1983, 500 F. 2d at 1255, we are not bound by the broad nature of the generalization and we doubt that it was so intended. 532 F. 2d at 263.

III.

The respondents seek to minimize the effect that the award of back pay would have on the petitioners, asserting that only five plaintiffs have been awarded back pay. However, respondents' characterization of the back pay as "but a minor adjunct of the equitable relief granted" is belied by the respondents' further statement that "the district court has not yet determined what relief will be afforded the plaintiff class." (Respondents' brief, p. 15). Respondents' apparent intention to return to the district court to seek back pay for the entire "plaintiff class" demonstrates the magnitude of the potential back pay liability in this case. The impact on the public treasury would not be diminished in any way by the "equitable" label.

IV.

Respondents' brief asserts that "recent federal legislative developments" concerning employment of the handicapped obviate the necessity for review of the constitutional issues in this case.

The legislative developments referred to by respondents are a recent regulation promulgated by the Department of Health, Education and Welfare (HEW) under Section 504 of the Rehabilitation Act of 1973, and an opinion of the Attorney General declaring drug addicts to be handicapped persons within the meaning of the regulation.

The HEW regulation (42 Fed. Reg. 22675, May 14, 1977) is limited specifically to recipients of federal funds from HEW. Since the Transit Authority does not receive funds

from HEW, it is not affected by the HEW regulation. The Transit Authority is a recipient of funds from the Department of Transportation (DOT) and will be affected by regulations yet to be promulgated by that Department.

The extent to which the DOT may require the employment of drug addicts will not be known until the DOT regulation is promulgated and interpreted. Speculation as to the scope and effect of a future DOT regulation is irrelevant to consideration of the significant constitutional issues presented by the petition herein.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for Certiorari, Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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ALPHONSE E. D'AMBROSE
Attorney for Petitioners
New York City Transit
Authority, et al.
370 Jay Street
Brooklyn, New York 11201

JOAN OFFNER
EUGENE FREIDUS
Of Counsel